JOHAN INTERNATIONAL LTD HONG KONG A

v.

ROY CHOK WAI KIM & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
NALLINI PATHMANATHAN JC
[SUIT NO: D1-22-755-1999]
14 MAY 2009

CIVIL LAW ACT: *Debt - Assignment - Civil Law Act 1956, s. 4(3) - Whether requirements complied with* C

CIVIL PROCEDURE: *Judgment - Consent judgment - Merger - Consent judgment entered into pursuant to a settlement agreement - Whether settlement agreement merged with consent judgment - Whether settlement agreement can still be basis for a claim - Different debt and different parties involved - Whether doctrine of merger did not apply* D

CONTRACT: *Assignment - Assignment of debt - Whether assignment created*

E

Pursuant to the breach of a Distribution Agreement between one Solahart Industries Pty Ltd. ('Solahart'), Solartech Sdn. Bhd. ('Solartech') and Strategic Technologies Sdn. Bhd. ('Strategic'), Solahart had commenced an action against the latter two companies in the High Court ('the D6 suit'). The matter was F settled and a settlement agreement was entered into between Solahart and Johan Int. on the one hand and Solartech, Strategic, the 1st Defendant ('Roy') and the 2nd defendant ('Chan') on the other hand. Subsequently, Solahart, Solartech, Strategic and the other defendants in the D6 suit entered a consent judgment in the G D6 suit. Johan Int. was the sole shareholder of Solahart. Roy and Chan were the directors and shareholders of Solartech and Strategic. The sum payable under the settlement agreement was RM1 million. Some RM300,000 of that sum was deemed paid and Johan Int. commenced this suit claiming against Roy and Chan the H balance sum of RM700,000. Roy and Chan contended, *inter alia*: (a) that Johan Int. had no right to bring this action as their obligation to pay the RM1 million was to Solahart; (b) that pursuant to cl. 2.1 (iii) of the settlement agreement the debt was assigned to Johan Holdings Berhad and therefore the correct party I to bring this action was Johan Holdings Berhad, as the assignee; (c) that since pursuant to cl. 2.4 of the settlement agreement, the

A debt had been assigned absolutely to Johan Int., cl. 2.4 must be read in conjunction with cl. 2.1(iii) which meant that Johan Int. and Johan Holdings Berhad were co-assignees of the debt and therefore both the companies must be made parties to the action; (d) that any assignment to Johan Int. cannot be absolute because B pursuant to cl. 3.2 Solarhart retained the right to enforce the said consent judgment; and (e) that the settlement agreement had 'merged' in the consent judgment and as such cannot comprise the basis for a claim.

C **Held (allowing the claim with costs):**

(1) The terms of the settlement agreement were made known to the court and annexed as a part of the order. There was express provision in the consent judgment that its enforcement was subject to the terms of the settlement agreement, meaning D that enforcement of the order by Solarhart against Solartech and Strategic was subject to the settlement agreement. The net effect was that in so far as the enforcement against Solartech and Strategic by Solahart was concerned, the terms of the settlement agreement prevailed over the provisions of E the consent order. (para 18)

(2) Under cl. 2.1 Roy and Chan undertook the entire liability to pay RM1 million to Solarhart. However Solarhart *vide* cl. 2.4 assigned the debt to Johan Int. Clause 2.4 complied with the F requirements of s. 4(3) of the Civil Law Act 1956 which prescribes the requirements for an absolute assignment. Therefore Roy and Chan were liable under the settlement agreement to pay RM1 million to Johan Int.. (para 18)

G **(3)** Clause 2.1(iii) provided the manner in which the payment to Johan Int. was to be paid, namely through Johan Holdings Berhad. The net effect of cl. 2.1(iii) was not to create an assignment in favour of Johan Holdings Berhad. Johan Holdings and Johan Int. were not co-assignees. As such there H was no reason for Johan Holdings Berhad to be a party to the action. (paras 18, 19 & 20)

(4) Clause 3.2 did not have the effect of diminishing or affecting the absolute assignment created *vide* cl. 2.4 of the settlement I agreement. (para 4)

(5) The net effect of the settlement agreement and the consent judgment was that Roy and Chan undertook the liability of Solartech and Strategic in the consent judgment, amounting to RM1 million. Since the settlement agreement created a new liability for new parties, it did not merge in the judgment. The doctrine of merger did not apply. (para 24)

Case(s) referred to:
BCCI v. Ali [2001] AC 251 ***(refd)***
Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896 ***(refd)***
Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(refd)***
Supreme Finance (M) Bhd v. Koo Sin Ken [1987] 1 CLJ 374; [1987] CLJ (Rep) 349 SC ***(refd)***
William Brandt's Sons & Co and Dunlop Rubber Company, Limited [1905] AC 454 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 4(3)

For the plaintiff - Rishwant Singh (Farah Shuhada with him); M/s Zul Rafique & Partners
For the defendants - Gunaseelan (Adrew Davis with him); M/s Gunaseelan & Assoc

Reported by Amutha Suppayah

JUDGMENT

Nallini Pathmanathan JC:

Introduction

[1] In this action the plaintiff, one Johan Holdings International Ltd. Hong Kong ('Johan Int.') makes claim against the 1st defendant, Roy Chok Wai Kim ('Roy') and the 2nd defendant, Chan Siew Lean ('Chan') for the sum of RM700,000 owed under the terms of a settlement agreement dated 28 May 1998 ('the settlement agreement').

Brief Facts

[2] Pursuant to the breach of a distribution agreement dated 1 May 1990 between one Solahart Industries Pty Ltd. ('Solahart') on the one hand and Solartech Sdn. Bhd. ('Solartech') and

Strategic Technologies Sdn. Bhd. ('Strategic') on the other, Solahart commenced an action against the latter two companies in Kuala Lumpur High Court *vide* Civil Suit No. D6-22-653-97 ('the D6 suit'). The matter was settled between the parties and the settlement agreement entered into between Solahart and Johan International, the plaintiff on the one hand and Solartech, Strategic, Roy and Chan on the other hand.

[3] On 5 June 1998, soon after the execution of the settlement agreement dated 28 May 1998, some of the parties in the settlement agreement entered a consent judgment in the D6 suit. The parties to the consent judgment were Solahart Industries Pty Ltd ('Solahart') being the plaintiff in the D6 suit, and Solartech Sdn. Bhd. ('Solartech'), Strategic Technologies Sdn. Bhd. ('Strategic'), Summer Sales and Services Sdn. Bhd. and Summer Technologies Sdn. Bhd. being the defendants in the D6 suit.

[4] For the purposes of this suit it is relevant to note that Solahart is a subsidiary of Johan International. Johan International is in fact the sole registered shareholder of Solahart. In so far as the defendants are concerned, Roy and Chan are the directors and shareholders of Solartech and Strategic.

The entire sum payable under the settlement agreement was RM1 million. Some RM300,000 of that sum is deemed paid under the terms of the settlement agreement as a consequence of an account taken in respect of stocks held by the parties and set-off. This is not in dispute.

The Dispute

[5] Roy and Chan maintain that they are not liable to pay the balance sum of RM700,000 as they contend that:

(a) The plaintiff in this action, Johan International, has no right to bring the action before this court. Their obligation to pay the RM1 million was to Solahart. They further contend that the effect of cl. 2.1(iii) of the settlement agreement, is to assign the rights to and interests in the debt to Johan Holdings Berhad and not the plaintiff, Johan International. It therefore follows they maintain that as the debt has been assigned to Johan Holdings Berhad, the correct party to bring the action for the recovery of the RM1 million is Johan Holdings Berhad, as the assignee.

(b) In further support of the contention that Johan International, the plaintiff is not the right party to bring this action, Roy and Chan make a further and alternative submission. A reading of cl. 2.4 of the settlement agreement states that the debt and the right to enforce it has been assigned absolutely to Johan International, the plaintiff.

Roy and Chan contend that cl. 2.4 cannot be read in isolation but has to be considered in conjunction with cl. 2.1(iii) of the settlement agreement. A reading of cls 2.1(iii) and 2.4 of the settlement agreement, it is contended, shows that both Johan International and Johan Holdings Berhad are co-assignees of the debt as cl. 2.1(iii) assigns the debt from Solarhart to Johan Holdings Berhad while cl. 2.4 assigns the debt from Solarhart to Johan International, the plaintiff. Johan International, the plaintiff and Johan Holdings Berhad are therefore co-assignees of the debt on such a construction. As co-assignees of the debt, it is contended that both Johan International as well as Johan Holdings Berhad must be made parties to the action. The absence of Johan Holdings Berhad it is maintained, renders the plaintiff's claim invalid as one of the co-assignees is not present.

(c) Roy and Chan also contend that any assignment to Johan International, the plaintiff cannot be absolute on a construction of the relevant clauses in the settlement agreement because cl. 3.2 provides that for so long as payments in cl. 2.1 are made, neither Solarhart not Johan International will enforce the consent judgment. This it is contended goes to show that there was no absolute assignment because Solarhart has retained the right to enforce the said consent judgment.

(d) The defendants also contend that the settlement agreement has 'merged' in the consent judgment and as such cannot comprise the basis for a claim, and that as such the claim ought to be dismissed.

(e) Finally the defendants maintain that the plaintiff has not proven the amount outstanding in that no evidence has been led by it of any sums of money being collected from other liable parties such as Solartech and Strategic, nor of any sums of monies realized from the security taken of a charge

registered over a property specified in the settlement agreement. The above, in a nutshell comprise the arguments and contentions put forward by the defendants.

The Trial

[6] At the outset of the trial, Mr. Rishwant Singh, counsel for Johan International, the plaintiff sought leave of the court to effect two amendments to the statement of claim:

(i) At para. 7.3 of the amended statement of claim he sought to have the words 'dan untuk akaun' which means 'and for the account of removed from the said paragraph;

(ii) At para. 7.9 of the amended statement of claim he sought to have the word 'bersama' in line four referring to 'joint liability amended to 'several' liability in keeping with the provisions of the settlement agreement.

Mr. Gunaseelan for the defendants opposed the application stating *inter alia* that the defendants would be prejudiced by these late amendments sought at the eleventh hour in that they had chosen not to take several other defences available to them based on the pleadings as they stood. Having considered the matter, I allowed the amendments as I was satisfied that there was no undue prejudice accorded to the defendants, primarily as the amendments sought reflected the actual provisions of the settlement agreement.

[7] Mr. Gunaseelan then applied to amend the defence to meet the foregoing amendments, as follows:

He proposed a new para. 13A to follow from para. 13 which reads as follows:

> Plaintiff had failed to apply to the court in proceedings D6-22-653-1997 pursuant to the Consent Order to obtain leave to enforce the terms of the Order, as provided by the Order.

A second amendment under a new para. 13B was proposed along the following lines:

> The Plaintiff ought to have made the first and second Defendants herein as parties to the D6 suit as that Consent Order purports to bind D1 and D2.

And finally a new para. 13C:

> The Plaintiff has failed to extract a perfected Order reflecting the Settlement Agreement in the Australian proceedings, which was a precondition mentioned in the Settlement Agreement.

Mr. Rishwant Singh had no objections to the first two amendments and indicated that he was prepared to concede the third amendment provided the plaintiff is allowed to call evidence to show compliance with that condition. There were no objections and the amendments sought by the defendant were duly allowed.

[8] The trial then proceeded with only one witness, Mr. Lee Pui Leng, PW1 ('PW1') for the plaintiff testifying. In essence PW1 testified on the chronology of events leading up to the settlement agreement and the consent judgment. He referred to the salient terms in the settlement agreement and his comprehension of how the settlement sum of RM1 million was to be paid and the parties responsible for such payment. PW1 explained that Chan and Roy were to pay Solahart the sum of RM1 million of which RM300,000 was to be paid on the execution of the settlement agreement. The balance sum of RM700,000 was payable in quarterly installments commencing on 1 January 1999 and payable thereafter no later than the 5th day of each quarter. He also explained the position of parties on default. If there was default in that the installment payments were not paid on the due date, the full balance would then fall due for payment.

One of the terms of the settlement agreement was that in return for the payment of a sum of RM100 paid by Johan International, the plaintiff, Solahart wholly assigned all its rights and interests in the said debt as well as the consent judgment to Johan International.

PW1 also highlighted the undertaking and guarantee afforded by Solartech and Strategic as well as their consent to judgment being entered against them in favour of Solahart for the sum of RM1 million. Interest was payable at the rate of 12% per annum compounded monthly in arrears on the outstanding sum. Roy, Chan, Solartech and Strategic are, under the terms of the settlement agreement severally liable for these interest payments in the event Roy and Chan default on the installments mentioned above. He stated that the balance sum of RM700,000 together with interest remains outstanding to date. He was not challenged on the balance sum outstanding in the course of cross-examination.

PW1 explained in cross-examination that Roy and Chan did not actually pay the RM300,000 on execution of the settlement agreement but that this sum was deemed paid as a consequence of stocktaking undertaken between the parties. Such payment was directed to Solahart. He concurred that payment of the sum of RM700,000 was to be paid to Johan Holdings Berhad for the benefit of Johan International, the plaintiff.

At the end of PW1's testimony, the plaintiff closed its case, save for the production of the perfected Australian Order, which Mr. Rishwant Singh undertook to produce upon Johan International making the same available to him. Mr. Gunaseelan then submitted that there was no case to answer and elected not to call any evidence in support of the defence. As this effectually brought the proceedings to a close, submissions commenced.

The Salient Clauses Of The Deed Of Settlement

[9] In order to comprehend the dispute between the parties reference has to be made to several salient clauses in the settlement agreement. They are as follows:

Clause 1 - 'The settlement as embodied in this deed shall constitute as a full and final settlement of all causes of action arising out of or in connection with the distribution agreement dated 1 May 1990. It is and shall be a Condition Precedent to this agreement that:

1.1 a consent order is entered into, drawn and perfected in the Supreme Court of Western Australia *vide* CIV 1820 in a form substantially similar to the draft consent order in Annexure A hereto; and

1.2 a consent order is entered into, drawn and perfected in the Kuala Lumpur High Court Suit No: D6-22-653-97 in a form substantially similar to the draft consent order in Annexure B hereto;

subject to any amendments as to form only as the courts may deem fit.'

Clause 2.1 - 'Roy Chok, and Rena Chan agree to pay Solahart a settlement sum of RM1,000,000 (Ringgit Malaysia One Million Only), the payment of which is to be effected in the following manner:

(i) Roy Chok and Rena Chan shall pay Solahart RM300,000 (Ringgit Malaysia Three Hundred and Thousand Only) immediately upon the execution of this agreement;

(ii) Roy Chok and Rena Chan shall pay Solahart the balance of RM700,000 (Ringgit Malaysia Seven Hundred Thousand) only in four quarterly instalments commencing 1 January 1999 and thereafter payable not later than the 5th day of each subsequent quarter. The first three quarterly instalments shall be for the sum of RM200,000 (Ringgit Malaysian Two Hundred Thousand) only each with the final quarterly instalment for the sum of RM100,000 (Ringgit Malaysian One Hundred Thousand) only. Time is of the essence in regard to these payments.

(iii) Payment is to be made either by Banker's Draft or telegraphic transfer to Johan Holdings Berhad, No. 6 Jalan Berasatu (13/4), 46200 Petaling Jaya, Malaysia for the account of Johan International, Account No: 302-228176-002 of Hongkong Bank (Branch Petaling Jaya, Malaysia)

(iv) If any instalment payment referred to in para. 2.1(ii) is not made on its due date, the full balance then outstanding will (without any further action being required by any party) immediately fall due for payment.

Clause 2.4 - 'In consideration of a sum of RM1 (Ringgit Malaysia One only) paid by Johan International the receipt and sufficiency of which is hereby acknowledged Solahart hereby wholly and irrevocably assigns absolutely and not by way of charge only all its:

2.4.1 right title and interests to the moneys specified in paragraph 2.1 above; and

2.4.2 its right title and interest to any judgment made by way of consent order in the Malaysian proceedings in accordance, with Annexure B to this agreement;

to Johan International and Solarhart, Solartech, Strategic Roy Chok and Rena Chan acknowledge that upon such assignment Johan International can take all necessary steps to enforce these assigned rights title and interests.

A Clause 2.5 - 'By executing this deed each of the parties hereby consent to and acknowledges the validity of the assignment referred to in cl. 2.4'

Clause 3.2 - 'Pursuant to such undertaking and guarantee
B Solartech and Strategic shall consent to judgment being entered in favour of the plaintiff for the said sum of RM1,000,000 (ringgit Malaysia One Million) only as in the consent order in the form of Annexure B to this deed, provided however that Solahart and/or Johan International will not enforce the judgment in para. 1 of the
C order for so long as the payments referred to in cl. 2.1 above are made on their respective due dates.'

Clause 4 - 'If Roy Chok and Rena Chan shall fail to pay the aforesaid sum or any part thereof under cl. 2 of this deed and it is necessary to commence proceedings to recover the same, then
D Roy Chok, Rena Chan, Solartech and Strategic shall severally be liable to pay interest at the rate of 12% per annum compounded monthly in arrears on the outstanding sum from the relevant due date of payment and all legal costs, expenses, disbursements, fees and losses on a solicitor and client basis.'
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[10] The salient terms of the consent judgment dated 5 June 1998 entered into between Solarhart as the plaintiff and Solartech, Strategic and two others as the defendants is as follows:

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1. Judgment be entered in favour of the plaintiff (ie, Solarhart) against the first and second defendants (ie, Solartech and Strategic) jointly and severally for the sum of Ringgit Malaysia One Million Only (RM1,000,000)

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And it is ordered that each party hereto be at liberty to apply to enforce the terms of this order and the deed provided that the enforcement of the judgment entered against the 1st and 2nd defendants in para. 1 aforesaid be subject to the terms of
H the deed .....

Issues

[11] The issues that arise for consideration may be summarized thus:

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(i) Is Johan International the correct party under the terms of the settlement agreement to bring this action against Roy and Chan, or is it Johan Holdings that is the rightful entity to bring these proceedings?

(ii) Alternatively should Johan Holdings Berhad be made a co-plaintiff and party to these proceedings together with Johan International, the plaintiff, in light of the provisions of cl. 2.1(iii) and cl. 2.4 of the settlement agreement which clauses, it is contended, have the joint effect of assigning the debt from Solarhart to Johan Holdings Berhad *vide* cl. 2.1(iii) and from Solarhart to Johan International *vide* cl. 2.4?

(iii) Has the settlement agreement 'merged' in the consent judgment such that the settlement agreement cannot comprise a basis for the claim filed here?

(iv) Johan International had failed to apply to the court in the D6 suit pursuant to the consent order to obtain leave to enforce the terms of the order, as provided by the order.

Johan International ought to have made Roy and Chan parties in the D6 suit in which the consent judgment was recorded, as that consent order purports to bind Roy and Chan.

(v) Has the quantum sought/claimed by Johan International been made out?

Each of these issues will be considered in turn.

Issue (i): Is Johan International The Correct Party To Bring This Action Against Roy And Chan Under The Terms Of The Settlement Agreement Or Is Johan Holdings The Rightful Entity To Bring These Proceedings?

[12] As outlined above, Mr. Gunaseelan for the defendants contends that in so far as payment of the monies due under the settlement agreement is concerned, an assignment has been created in favour of Johan Holdings Berhad *vide* cl. 2.1(iii) (set out above). In view of the assignment of the monies in favour of Johan Holdings Berhad, it is contended that Johan International, the plaintiff cannot bring the action, only Johan Holdings Berhad.

[13] The success of this argument turns on a construction of cl. 2.1(iii). In support of his proposition, Mr. Gunaseelan relies on *William Brandt's Sons & Co and Dunlop Rubber Company, Limited* [1905] AC 454, a decision of the House of Lords. In that case, *William Brandt' Sons & Co.* ('Brandt's) were bankers in London, while *Kramrisch & Co.* ('Kramrisch') were rubber merchants in Liverpool. Kramrisch's business was 'financed' by Brandt's and other bankers. Kramrisch had an arrangement with its bankers. When Kramrisch made a purchase approved by the bankers, the

bankers provided the necessary funds and by way of security the bankers took delivery of the goods to themselves. Then when Kramrisch found a purchaser approved by the bankers they released the goods and gave Kramrish a delivery order, relying on a written undertaking in each case that the price should be paid direct to them and receiving confirmation in writing from Kramrisch that they would hold the goods and the proceeds in trust on their behalf and grant them the sole and absolute lien on the goods and their proceeds until they obtained full payment of the advance, together with their charges. Every transaction was dealt with separately. In this context on a particular transaction with the Dunlop Rubber Company, Kramrisch sent to Brandts a printed form comprising two parts: the first part being a letter from Kramrisch to Dunlops and the second a letter intended to be signed by Dunlops and returned by them direct to Brandts. The second part, ie, the letter from Dunlop directly to Brandt's, the bankers, reads as follows:

> ... Dear Sirs, Herewith we beg to confirm that we shall remit subject to approval of goods, the amount of invoice - (amount stated) received today from Messrs. Kramrisch, Liverpool, when due, direct to your goodselves for account of Messrs. Kramrisch & Co. Yours faithfully ...

[14] The House of Lords construed the entire arrangement and concluded that it comprised an equitable assignment with notice to the debtor. This is what Lord Macnaghten said:

> ... The whole question then, depends on the meaning and effect of Brandts' letter of 7 January 1903, sent as they were to the company and received by the company, notice that Brandts were interested in the money or what was their meaning? Does a business man who merely wants his debtor to pay the amount of the debt into his bank employ such elaborate machinery as this? Did anybody every hear of such a complicated process, if that was all that was meant? ... "There was notice to Dunlops" says Walton JI, " and in fact, was more than notice. It was notice to Dunlops that Messrs. Kramrisch had made over to Brandts the right to receive this sum of money, and had given to Brandts power to give a perfectly good receipt and discharge for it ... It is difficult to conceive of a plainer case of an equitable assignment or a clearer case of notice to the debtor ... Then the Dunlops receive through Brandts a notice which no man of business could mistake, telling them, on Kramrisch & Go's express authority, that they are to pay to Brandts the money which they owe their creditors, Kramrisch & Co. What more could be required? Dunlops disregard that notice and pay the wrong people. They must pay the money over again and pay it to the right person ...

[15] Drawing a parallel with the foregoing, the defendants contend that the effect of the words used in cl. 2.1(iii) namely that "payment is to be made either by Banker's Draft or telegraphic transfer to Johan Holdings Berhad (address) for the account of Johan International, Account No: ..." is to create an equitable assignment in favour of Johan Holdings Berhad, presumably with notice to Johan International.

In the *William Brandt's and Dunlops* case, it is evident from the passage reproduced above, that Kramrisch the debtor and supplier had an elaborate arrangement with his bankers which would ensure that his bankers received monies direct from his customers. It is in the context of this complex financial arrangement and factual background that Lord Macnaghten concluded that the words in the letter issued in favour of Brandts created an assignment in favour of the bankers.

[16] What is the position here? This case, quite unlike *William Brandt*'s case relates to a settlement agreement whereby the defendants undertake to pay the sum of RM1 million to Solarhart, a debt which, by the very same settlement agreement is assigned to Johan International in cl. 2.4. This is clear from a construction of the entirety of cl. 2.1. The effect of cl. 2.1(iii) is to specify the precise manner in which payment to Johan International is to be made, ie, through Johan Holdings Berhad. This is borne out by the express words 'for the account of in the said clause. It is a simple direction to the debtors to make the payment through the account of Johan Holdings Berhad. There is no factual matrix or elaborate payment arrangement in this case which warrants a construction that the clause assigns the debt due from Roy and Chan to Johan Holdings Berhad.

[17] Mr. Rishwant Singh for the plaintiffs urged the court to interpret the settlement agreement so as to ascertain the meaning which the document would convey to a reasonable person. He cited *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 where Lord Hoffman set out the principles of construction to be adopted in interpreting agreements with a view to ascertaining the common intention of the parties. In this much cited passage Lord Hoffman summarized the law about the interpretation of contracts in five principles as follows:

A (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

B (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception C to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of D subjective intent. They are admissible only in an action for rectification ...

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter E of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are F ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties, must for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749).

G (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the H language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v. Salen Rederienra AB, (The Antaios)* [1985] AC 191:

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> ... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

In *BCCI v. Ali* [2001] AC 251 Lord Bingham of Cornhill summarized the principles as follows:

> To ascertain the intention of the parties, the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties, relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions, the court does not of course inquire into the parties subjective states of mind but makes an objective judgment based on the materials already identified.

[18] Applying the foregoing principles to the facts of this case, it follows that:

(i) The purport of the settlement agreement is to procure Ray Chok and Rena Chan to take liability for the payment of RM1 million;

(ii) As a condition precedent, consent orders or judgments have to be entered, drawn and perfected in both Australia and Malaysia;

(iii) In Malaysia the consent judgment is entered by Solarhart Pty. Ltd. against Solartech and Strategic. However the terms of the settlement agreement are made known to the court and annexed as a part of the order. Additionally there is express provision that in the consent judgment that its enforcement is subject to the terms of the settlement agreement, meaning that enforcement of the order by Solarhart against Solartech and Strategic is subject to the settlement agreement. The net effect is that in so far as the enforcement against Solartech and Strategic by Solahart is concerned, the terms of the settlement agreement prevail over the provisions of the consent order;

(iv) Under cl. 2.1 Roy and Chan expressly undertake the entire liability to pay RM1 million to Solarhart. However Solarhart *vide* cl. 2.4 assigns the debt to Johan International. Therefore Roy and Chan are liable under the settlement agreement to pay RM1 million to Johan International.

(v) Clause 2.1(iii) provides the manner in which the payment for the account of Johan International is to be paid, namely through the account of Johan Holdings Berhad.

[19] I am unable on the entirety of the facts before this court to conclude that the net effect of cl. 2.1(iii) is to create an assignment in favour of Johan Holdings Berhad. To do so would amount to construing that particular clause 'perversely' and in isolation to the rest of the settlement agreement, which infringes the principles of construction as outlined above. The clear purport of the settlement agreement is, *inter alia*, to set out the compensation sum to be paid by Roy and Chan to Johan International and the manner in which such payment is to be made. To construe the clause as constituting an assignment to Johan Holdings is not in keeping with the purport of the rest of the agreement. For these reasons and those cited in para. 4.5 above, I find that cl. 2.1(iii) does not have the effect of creating an assignment in favour of Johan Holdings Berhad.

Ancillary Issue: Alternatively Should Johan Holdings Berhad Be Made A Co-plaintiff And Party To These Proceedings Together With Johan International, The Plaintiff, In Light Of The Provisions Of Cl. 2.1(iii) And Cl. 2.4 Of The Settlement Agreement Which Clauses, It Is Contended, Have The Joint Effect Of Assigning The Debt From Solarhart To Johan Holdings Berhad Vide Cl. 2.1(iii) And From Solarhart To Johan International Vide Cl. 2.4?

[20] This alternative submission is premised on the same reasoning as issue (i) save that it is contended here that the net effect of the clause is to create an assignment involving both Johan Holdings Berhad as well as Johan International such that they are effectively co-assignees of the debt. I adopt the reasoning above in relation to this contention, and for the same reasons reject the proposition that Johan Holdings and Johan International are co-assignees. As such there is no reason for Johan Holdings Berhad to be a party to this action as a co-assignee.

Issue (ii): No Absolute Assignment Is Effected Vide Cl. 2.4 Of The Settlement Agreement Because Solarhart Has Retained The Right To Enforce The Said Consent Judgment In Cl. 3.2 Of The settlement agreement.

[21] As outlined above cl. 2.4 expressly provides that Solarhart absolutely assigns its debt and all rights, title and interest to the sum of RM1 million as well as the right title and interest in the consent judgment. Notice is expressly accorded to Roy, Chan, Solartech and Strategic and acknowledged by them under the terms of the same clause. It is evident from a perusal of this clause

that Solarhart therefore assigns the debt wholly to Johan International. The clause complies with the requirements of s. 4(3) of the Civil Law Act 1956 which prescribes the requirements for an absolute assignment, (see *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231).

The defendants however contend that the assignment cannot be an absolute assignment because *vide* cl. 3.2, Solarhart and/or Johan International undertakes not to enforce the judgment so long as the payments by Roy and Chan are made on the respective due dates. It is contended that if Solaharhart can enforce the judgment, the assignment in cl. 2.4 cannot be completely effective.

[22] As the requirements for an absolute assignment under s. 4(3) of the Civil Law Act 1956 have been met, it follows that cl. 2.4 effects a complete or absolute assignment of the rights and interests of Solarhart in the rights title and interest to the sum of RM1 million as well as the right title and interest to the consent judgment. However this assignment only takes effect after the conditions precedent in the settlement agreement are met. Until those conditions precedent are met, the assignment does not take effect, and during that period Solarhart remains entitled to enforce the consent judgment. It is for this reason that cl. 3.2 refers to Solarhart, namely to deal with the period prior to the fulfillment of the condition precedent, when the debt remains unassigned. Further during this period, as the settlement agreement would not have taken effect, its terms cannot prevail in respect of Solartech and Strategic.

Given the timing above, there appears to be no inconsistency or anomaly in cl. 3.2 making reference to both Solartech and/or Johan International. It certainly does not have the effect of diminishing or affecting the absolute assignment created *vide* cl. 2.4 of the settlement agreement.

Issue (iii): Has The Settlement Agreement 'Merged' In The Consent Judgment Such That The Settlement Agreement Cannot Comprise A Basis For The Claim Filed Here?

[23] The defendants rely on the case of *Supreme Finance (M) Bhd. v. Koo Sin Ken* [1987] 1 CLJ 374; [1987] CLJ (Rep) 349 in support of the proposition that the settlement agreement has 'merged' in the consent judgment. As a consequence of such

merger, it is contended that it can no longer form the basis for the plaintiff's claim, with the net result that the plaintiff's action should be dismissed.

In *Supreme Finance* the Supreme Court stated of the judgment as follows in relation to merger:

> ... The question is whether the debt merged in the judgment Clearly where a judgment is recovered in respect of a debt any other personal remedy for the same debt is extinguished or merged in the judgment ...

[24] Applying that general principle to the facts of this case, the defendants contend that the settlement agreement has 'merged' in the consent judgment. This contention is fallacious for the following reasons:

(i) It is apparent from the principle cited above that where judgment has been recovered in respect of a debt, any other personal remedy for the same debt is merged in the judgment. However in the instant case, the debt which comprises the subject matter of the consent judgment is the debt between Solarhart and Solartech and Strategic. The debt forming the subject matter of the settlement agreement is a debt undertaken by Roy and Chan payable to Johan International. The net effect of the settlement agreement and the consent judgment is that Roy and Chan undertake the liability of Solartech and Strategic in the consent judgment, amounting to RM1 million. As the settlement agreement creates a new liability for new parties it cannot be said that it is the same debt as that in the consent judgment. As it is not the same debt but a different debt in that different parties have contracted to make the payment it cannot and does not merge in the judgment. The doctrine of merger does not apply here.

(ii) It is of note that the settlement agreement is structured such that it is envisaged that the consent judgments are first entered and drawn and perfected in Australia and Malaysia prior to the settlement agreement taking effect. Although the consent judgment was entered into on 5 June 1998 while the settlement agreement was executed on 28 May 1998, the settlement agreement did not come into effect until the two court orders were entered, drawn and perfected. In short the settlement agreement came into effect after the court orders

and cannot therefore have merged with the court order, having come into existence in relation to a new liability or debt, after the perfection of those two orders.

As such the plaintiff is entitled to commence this action on the basis of the settlement agreement.

Issue (iv): Johan International Had Failed To Apply To The Court In The D6 Suit Pursuant To The Consent Order To Obtain Leave To Enforce The Terms Of The Order, As Provided By The Order.

Johan International Ought To Have Made Roy And Chan Parties In The D6 Suit In Which The Consent Judgment Was Recorded, As That Consent Order Purports To Bind Roy And Chan

[25] There is no reason why Johan International has to apply in the D6 suit to be made a party to the consent order and to seek to join Roy and Chan as well. In the D6 suit, Johan International, Roy and Chan were not parties. It is only by virtue of the settlement agreement whereby Roy and Chan undertook the liability of Solartech and Strategic and the debt was assigned to Johan International that new terms and liabilities were created for the collection of the RM1 million.

The consent judgment does not purport to bind Roy and Chan. It is the settlement agreement that is binding on Roy and Chan. Where the settlement agreement and the consent judgment 'intersect' so to speak, is in relation to the liability of Solartech and Strategic, and there is express provision in the consent judgment that the settlement agreement prevails in relation to any enforcement of the judgment. This does not afford a basis for the terms of the settlement agreement to be rendered unenforceable.

Issue (v): Has The Quantum Sought/Claimed By Johan International Been Made Out?

In his examination in chief PW1 gave evidence that the 'entire balance sum of RM700,000 together with the interest at the rate of 12% per annum compounded monthly in arrears from 1 January 1999 to the date of realization is due and owing'. He also stated in the course of cross-examination that this action has been instituted because the sums have not been paid.

PW1 was not cross-examined on this point. He was not challenged on this point, nor was he asked whether or not any part payment had been made to his knowledge. In the absence of such cross-examination, it cannot be said that the quantum claimed by Johan International, the plaintiff has not been made out.

In any event it is evident from the pleadings as well as the evidence led by the plaintiff that the claim and the entire trial is premised on recovery of the sum of RM700,000.

The Conditions Precedent - Were They Met?

[26] During the course of trial, the plaintiffs produced the perfected Malaysian Court Order, thus complying with the requirements of cl. 1 of the settlement agreement. They undertook to provide the perfected Australian order. On 15 April 2009 they duly did so. As such it is apparent that they have met the defendants' challenge with regard to the two orders.

[27] Having considered all the issues raised by the defendants and having construed the settlement agreement as a whole, I am satisfied that Johan International, the plaintiff has proved its claim that the defendants, Roy and Chan have failed to pay the balance sum of RM700,000 due to it under the terms of a settlement agreement dated 28 May 1998.

[28] Accordingly the plaintiff is granted judgment in terms of prayers (a)(i) and (ii) of para. 10 of the statement of claim. For avoidance of doubt it is specified that the plaintiff is granted judgment in the sum of RM700,000 together with interest on the said sum at the rate of 12% per annum compounded monthly in arrears on the said sum from 1 January 1999 until full settlement. The plaintiff is also awarded the costs of this action.